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An Effective Compromise

Class-Based Affirmative Action in Boston Schools

Gabriel O'Malley, J.D.

The author seeks to shift the traditional focus of the affirmative action debate from race to class. With the Boston Latin School as an example, he argues that, under certain circumstances, a shift in an admission policy based on preferences from race to class will maintain academic standards while increasing minority representation; it will also expand opportunity for economically underprivileged youths who have succeeded academically despite the obstacles they face. A focus on class rather than race offers both sides of the affirmative action debate a philosophy that can be reconciled with their views on race-based affirmative action. In certain situations, class-based affirmative action in the context of school admission offers a practical, successful alternative to the debate that has been raging for years.

Since the early 1970s, when the nation watched in horror as racial antagonism in Boston erupted into protests and riots over the issue of court-ordered busing in education, the city has endured lingering international, national, and local perceptions about its poor race relations. Whether entirely true or not, the perspective has often worked to divide a city already fractured along racial lines. Racial hostilities re-emerged in the late 1990s, this time over the affirmative action admission policy of the Boston Latin School, one of the city's three examination-based magnet schools. On November 19, 1998, the First Circuit Court of Appeals struck down the affirmative action admission policy of Boston Latin, holding that it violated the Equal Protection clause of the Fourteenth Amendment to the Constitution.¹ The decision, which pinched a nerve that has consistently troubled the city, set off the latest round of salvos from those on either side of the affirmative action debate, and once again, Boston's various communities found themselves in a contentious battle over the fate of the city's children. It has been more two years since the Court of Appeals ruling, and quite predictably, some of this furor has subsided. Time has, however, done little more than stop the bleeding; the rift remains. The judicial resolution of the issue has not solved the epistemological divide in the Boston community over what values Boston Latin, the premier public school in the city, should strive to promote.

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In Boston, as well as across the nation, the partisan ideology of the affirmative action front is laden with emotion and history. So much so, in fact, that there has been little room for the emergence of new ideas on the issue. Instead, since June 1965, when President Lyndon Johnson first outlined the concept of affirmative action in a speech at Howard University, those on both sides of the issue have continued to bang their heads against a wall of opposition, merely speaking at, and too often past, those they seek to convince. Such entrenchment is predictable given the vast philosophical gulf between the two sides. The differences over affirmative action are difficult to reconcile. Although a strictly formalistic approach to admission preserves many of the principles of meritocracy and the free market that America holds so dear, it often limits the range of people for whom it truly opens up market or educational opportunities. Conversely, the race-conscious, results-based approach of affirmative action tends to treat people as members of a group rather than as individuals, and it can stigmatize the very group or individual it intends to help. These competing visions have led to an intractable ideological conflict. It is on this chiaroscuro that the city of Boston must work to recreate an admission policy for Boston Latin that is constitutional, implementable, and palatable to the array of interest groups invested in the city's school system.

In striking down Boston Latin's affirmative action admission policy, the First Circuit left open a limited possibility for the school to continue an admission policy that relies on race as a factor.² The political will to administer such a program has evaporated, however, leaving the city with an admission policy based on student grade point average and standardized test scores that still frustrates many. How might Boston escape this pitched battle over admissions and devise a plan acceptable to both sides of the debate? One possibility is a race-neutral scheme of admissions with the stated goal of aiding disadvantaged students through affirmative action programs based on class, not race. Such a class-based scheme presents a condign alternative to the embattled creed of both camps in the traditional affirmative action debate. An admission policy based on class rather than race would, in its simplest form, take into account parental income in determining whether to grant a student an admission preference. At its most complex, such action would rely on a sophisticated formula to determine which students receive admission preferences; parental income, wealth, and education, as well as family structure and neighborhood influences, would affect the relative advantage to a student in the admissions process.

Though not a panacea for all problems, class-based affirmative action could bridge the gap between the competing views on race-based affirmative action. Working within the parameters of the Constitution, it corrects some of the problems associated with racism without upsetting the free market ideals of individuality and meritocracy that drive many opponents of traditional affirmative action. Although the approach is assailable, and has come under attack from both sides of the debate, in certain situations its application works to undermine many of the criticisms that attach to it. A small, heterogeneous city like Boston has the size limitations and diversity to enable class-based affirmative action to be a successful, constitutional answer to the admissions question over which the city has been fighting — an answer that could be acceptable, politically and philosophically, to Boston's vast array of interest groups and would benefit those whom Boston Latin was designed to serve, the city's brightest children.

Background

Founded in 1635, the Boston Latin School is the oldest public school in America, and is the most prestigious of Boston's three examination-based magnet schools.³ In assessing any admission policy to Boston Latin, it is important to note just how impressive the school is. Among its other notable alumni, Boston Latin claims five signers of the Declaration of Independence as former students, including Benjamin Franklin, John Hancock, and Samuel Adams. Both academically rigorous and intellectually challenging, it stands as a strict meritocratic test for those students who are admitted, rewarding achievement, and embracing the idea that education is partly a race in which some will fare better than others.⁴ "Excellence in education is not elitist," former headmaster Michael Contompasis told *The New York Times*.⁵ "It is what made America strong."⁶

Over the last three hundred sixty-six years, the school has maintained its superb reputation, surviving controversies along the way over coeducation and desegregation in the 1970s and later, "fiscal uncertainty, layoffs, accusations of elitism, assaults on traditional education, and political maneuvering."⁷ In 2000, for the second straight year, students at Boston Latin boasted the highest Massachusetts Comprehensive Assessment System test scores in the state.⁸ Admitted students can anticipate up to three hours of homework nightly. On graduation more than 98 percent of Boston Latin graduates go on to four-year colleges; of those students, roughly 90 percent receive some sort of scholarship.⁹ Given this history and continuing legacy of achievement, competition to be admitted into the school is fierce. More than three thousand applicants apply for the roughly four hundred forty places open in the seventh grade each year. Overall, fewer than 10 percent of the city's seventh through twelve graders attend Boston Latin, making it a haven for the most talented children in the city.

Despite enjoying a special status among Boston schools, Boston Latin is still part of the Boston public school system. Any change in the school system required by either the courts or the School Committee affects Boston Latin just as it does the other schools. In 1974, a federal district court ruled that the city of Boston had violated the constitutional rights of African-American children by promoting and maintaining a racially segregated public school system.¹⁰ At the time, although the court found no specific evidence that Boston Latin's examination-based admission policy discriminated against anyone, or that those in charge of Boston Latin were purposely discriminating and intending to promote school segregation, the demographics of the school made it abundantly clear that the city's examination schools helped to maintain and promote a dual system that other Boston policies had invidiously promoted.¹¹ The court ordered Boston Latin and the other examination-based schools to ensure that African-American and Latino children comprise a minimum of 35 percent of each entering class.¹²

In 1987, the court reviewed the public school system again. Based upon the distribution of students in the system, and a finding of a good faith effort towards change demonstrated by the school administrators, the court relinquished control of the system's student assignments.¹³ Nevertheless, though it was no longer under a legal duty to do so, the Boston School Committee chose to continue the admission policy.¹⁴ In 1995, however, Catherine McLaughlin, a disappointed applicant, challenged the constitutionality of the 35 percent set-aside for minority admission.¹⁵ A

district court granted injunctive relief, and the School Committee discontinued the plan.¹⁶ Fearing that this change in admission policy would drain the examination schools of African-American and Hispanic students, school officials adopted a more flexible set aside policy.¹⁷

The flexible policy worked as follows: to gain admission to any one of the exam schools, a student had to take a standardized test, the results of which were combined with each applicant's grade point average (hereinafter GPA).¹⁸ This produced a composite score that school administrators used to rank all students.¹⁹ School officials then assigned individuals to the applicant pools for the examination schools in which the students had expressed an interest.²⁰ To be eligible for admission to any one of the three schools, an applicant had to be in the "qualified" applicant pool (hereinafter QAP), which was comprised of the top 50 percent of the overall applicant pool of the selective school of their choice.²¹ Half the available seats at an examination school were allocated in strict accordance with the composite score rank order.²² To select the other half, school officials determined the relative proportions of five different racial ethnic categories (white, African-American, Hispanic, Asian, Native American) of the students in the QAP who had not been selected on the basis of their composite score.²³ School administrators then filled the remaining seats using composite scores, but the total number of students selected from each racial/ethnic category had to be proportionate to the percentage of each racial/ethnic category in the remaining QAP.²⁴ Because the makeup of those admitted had to mirror that of the remaining QAP, it was possible for a member of a certain racial/ethnic group to be passed over in favor of a lower ranking applicant of a different racial/ethnic group if the seats allotted to the former's ethnic/racial group had been filled.²⁵

This is exactly what happened to Sarah Wessman in 1997.²⁶ Boston Latin had 90 seats available for the entering ninth-grade class.²⁷ Based on her composite score, Wessman ranked 91st in the QAP.²⁸ To fill the first 45 seats, the school extended invitations to 47 candidates (two declined to attend).²⁹ Had composite scores alone been used to evaluate the rest of the applicants, Wessman would have been admitted.³⁰ However, because the racial/ethnic makeup of the remaining QAP was 27.83 percent African-American, 40.41 percent white, 19.21 percent Asian, 11.64 percent Hispanic, and 0.31 percent Native American,³¹ the remaining 45 spots were allocated to 13 African-American students, 18 white students, 9 Asian students, and 5 Hispanic students.³² As a result, African-American and Hispanic children, with composite score rankings between 95th and 150th, were admitted ahead of Sarah Wessman and 10 other white students with higher composite scores.³³

The First Circuit's decision in *Wessman v. Gittens* invalidating Boston Latin's flexible set-aside policy followed a trend among American courts giving little support for race-based affirmative action.³⁴ The court insisted, however, that it was not declaring affirmative action dead.³⁵ Thus, the case is important for several reasons. First, unlike the Fifth Circuit in *Hopwood v. Texas*, the First Circuit affirmed the Supreme Court's tenuous decision in *Regents of the University of California v. Bakke* that diversity is a compelling state interest under the Fourteenth Amendment.³⁶ Second, the court indicated that educational institutions must show a dearth of minority representation before diversity will suffice as a compelling state interest.³⁷ Third, it confirmed that educational institutions will have a hard time establishing that their admission programs are created to remedy past discrimination.³⁸ Finally, it suggested that schools should consider creating admission policies that provide opportunity for

those from particular underrepresented schools, as opposed to underrepresented racial groups.³⁹

Standard of Review

Any admission policy that considers race as a factor must survive strict judicial scrutiny to avoid invalidation under the Fourteenth Amendment.⁴⁰ Although the strict scrutiny standard of review arose as a way to protect certain minority groups, it has later been applied to any public law regarding race, whether it burdens or benefits a minority group.⁴¹ In 1989, in *City of Richmond v. J. A. Croson*, the Supreme Court ruled that the Fourteenth Amendment requires a state or local government to demonstrate a compelling state interest in order to award governmental contracts based on race.⁴² More recently, in *Ardarand Constructors, Inc. v. Pena*, the Court used the same standard in holding that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. Such classifications are constitutional only if they are narrowly tailored measures further compelling governmental interests.”⁴³

Many lower courts have also applied strict scrutiny in striking down race-conscious policies in the field of education.⁴⁴ Of these cases, *Hopwood v. Texas* has garnered the most attention. There the court struck down an admission policy at the University of Texas Law School that used different standards for admitting whites and certain minorities.⁴⁵ In applying strict scrutiny to the case, the court found that achieving diversity cannot serve as a compelling state interest and that the school failed to prove that the policy remedied the present effects of past discrimination.⁴⁶ Similarly, in *Podberesky v. Kirwan*, the Fourth Circuit struck down a University of Maryland scholarship program limited to black students, holding that the university presented insufficient proof that the policy remedied the present effects of past discrimination.⁴⁷ Because of the narrowness of the remedial exception, the question naturally arises whether at least in the educational setting, diversity can supply the necessary compelling state interest.

Diversity as a Compelling State Interest

In *Wessman*, the court noted a trend away from treating diversity as a compelling state interest but stated that “any such consensus is more apparent than real.”⁴⁸ The court stressed that *Hopwood* is the only case to have rejected diversity outright, and it emphasized that it did so “only in the face of a vigorous dissent from a substantial minority of the active judges of the Fifth Circuit.”⁴⁹ Although the panel in *Hopwood* pronounced Justice Powell’s controlling opinion in *Bakke* dead, the *Wessman* court balked at this apparent act of lower court reversal of a Supreme Court precedent: “It may be that the *Hopwood* panel is correct and that, were the [Supreme] Court to address the question today, it would hold that diversity is not a sufficiently compelling interest to justify a race-based classification. It has not done so yet, however, and we are not prepared to make such a declaration in the absence of a clear signal that we should.”⁵⁰

Despite the First Circuit’s unwillingness to follow the Fifth Circuit’s stringent precedent, it would seem that Boston Latin falls outside any need for diversity that the First Circuit might find compelling. The School Committee acknowledged at

oral argument that Boston Latin had historically been diverse with respect to everything but race and ethnicity (gender, neighborhood, and socioeconomic representation).⁵¹ The court noted that over the previous ten years, if the school had used the strict merit approach, black and Hispanic students would have made up roughly 15 to 20 percent of each entering class, and minorities as a whole would have constituted an even greater percentage.⁵² The court noted, “Even on the assumption that the need for racial and ethnic diversity alone might sometimes constitute a compelling interest sufficient to warrant some type of corrective governmental action, it is perfectly clear that the need would have to be acute — much more acute than the relatively modest deviations that attend the instant case. . . . The School Committee’s flexible racial/ethnic guidelines appear to be less a means of attaining diversity in any constitutionally relevant sense and more a means for racial balancing.”⁵³ Thus, though the court did not dismiss Justice Powell’s opinion in *Bakke* that diversity can serve as a compelling state interest, it left proponents of race-based affirmative action with little room to justify their policy on the grounds of diversity as a compelling state interest, given the makeup of Boston Latin.⁵⁴ Therefore, any attempt to revive a race-based admission policy would have to do so under the guise of eliminating the vestiges of past discrimination.⁵⁵

Eliminating the Vestiges of Past Discrimination

A series of Supreme Court decisions has made it very difficult for any governmental race-based policy to pass constitutional muster unless it is narrowly tailored to remedy specific, identifiable instances of prior discrimination.⁵⁶ The Court has struck down racial preferences in government contracting, and in drawing congressional and legislative districts,⁵⁷ and the Court has recognized that remedying the present effects of past discrimination can serve as a compelling state interest only if there is a “strong basis in evidence” to prove those effects.⁵⁸ The *Wessman* court, following suit, required the school board not only to detail what disparities existed between minorities and whites, but to produce evidence that these disparities were not the result of other factors, such as societal discrimination, that are wholly separate from those produced by the Boston school system.⁵⁹

The court rejected the School Committee’s main allegation that low teacher expectations for black and Hispanic students persist throughout the school system and represent an attitudinal remnant of past discrimination.⁶⁰ The School Committee’s theory leaned heavily on the testimony of a sociologist whose primary research had been conducted in the Kansas City school system.⁶¹ The court dismissed this testimony because the sociologist’s work had no relation to Boston, amounting to mere speculation of correlation as opposed to evidence of causation.⁶² Furthermore, the court refused to accept the testimony because the expert conceded that the data used “was not of the quality necessary to satisfy methodological rigors required by his discipline.”⁶³ Similarly, the court rejected other testimony on the issue because it was anecdotal and therefore possessed no methodological or empirical support for its conclusions.⁶⁴ However, the court did not go so far as to “propose that the achievement gap bears no relation to some form of prior discrimination.”⁶⁵

Despite a few reservations, the First Circuit was willing to accept the elimination of vestiges of past discrimination as a compelling state interest if it was presented with sufficient evidence.⁶⁶ First, the court maintained that in order for any admission

policy to survive the mandate of the Fourteenth Amendment, the school committee needed to be able to explain how the policy would alleviate a major cause of the remnant of past discrimination.⁶⁷ When asked about this at trial, the deputy school superintendent was unable to respond with any clarity, claiming that it was a “complicated question to answer.”⁶⁸ Second, the court noted that the admission policy was too broad, as it would affect minorities applying to Boston Latin from private schools who had never been affected by the present remnants of past discrimination in the Boston school system.⁶⁹ Last, the court noted that the policy was overbroad because it could have the unintended effect of denying admission to a minority student in favor of a white who had never been negatively affected by past discrimination.⁷⁰ In fact, the court noted, this very situation occurred at the O’Bryant School, one of Boston’s other examination schools that used the same admission policy.⁷¹ There, two Hispanic students were rejected from the 1997 ninth-grade entering class in favor of a white student simply because the number of Hispanic students in the QAP was small, and thus fewer seats could be allotted to Hispanic students.⁷²

The court’s decision, written in the face of a vigorous dissent which argued that the evidence presented was sufficient to prove the vestiges of past discrimination in the Boston school system, opens the door, if only slightly, for proponents of affirmative action who continue to advocate for its implementation in the Boston school system. Empirical data about the effect of low teacher expectations on minority students, coupled with a more narrowly tailored admission policy might prove constitutional under the First Circuit reasoning. But any new plan would have to supply a solid reason why such a policy would work to undermine low teacher expectations, and it would have to be limited to only those children who have passed through the Boston public school system and been adversely affected by the present remnants of prior discrimination.

What Next?

Obviously, a plan that fits these remedial requirements would be difficult to create. Nor is it clear that the School Committee would even wish to succeed. It is inevitable that one day the Supreme Court will take up the issue of affirmative action in educational admission policies again, and there is a significant probability that it will reject them save under narrow remedial circumstances that might not apply to Boston Latin. In the meantime, in order to gauge the future, we are left to search public opinion and interpret judicial reasoning. The Supreme Court has asserted that race-based affirmative action will be subject to strict scrutiny;⁷³ the Federal Appeals courts for Texas, Louisiana, and Mississippi have struck down the use of race in admission to public universities;⁷⁴ voters in California have amended their state constitution to forbid discrimination in favor of or against persons due to race or gender;⁷⁵ and public opinion polls across the country show that support for affirmative action is waning.⁷⁶ Regardless of whether or not a new race-based admission policy at Boston Latin could withstand the First Circuit’s scrutiny, the impetus for race-based affirmative action is fading.

Not surprisingly, Boston school superintendent Thomas Payzant abandoned the idea of implementing a new race-based admission policy to Boston Latin.⁷⁷ Instead, on October 20, 1999, Payzant recommended a new policy, which was met with some initial resistance within the School Committee and at public hearings.⁷⁸ First,

Payzant proposed that the school system continue to use the Independent Secondary School Entrance Exam and unweighted grade point averages as barometers of student aptitude, reasoning that, “assigning additional weights to different programs and schools does not substantively change enrollment patterns and contributes to a false sense of precision.”⁷⁹ Second, Payzant recommended that fifth and seventh grade GPAs be used as well as those from sixth and eighth grades, claiming that “the addition of 5th and 7th grade final marks to compute the GPA would provide the perspective of additional teachers in assessing students’ work and mitigate the adverse impact on a student who experienced poor grades in one 6th or 8th grade marking period.”⁸⁰ Third, Payzant recommended that equal weight be given to a student’s grade point average and test scores in calculating a student’s composite score, reasoning that “equal weight for grades and test scores gives fair consideration both to students who have equal strengths balanced across both types of indicators, as well as students who have greater strength in one of these areas.”⁸¹

Class-Based Affirmative Action as an Alternative

With regard to Boston Latin, race-based affirmative action has proved to be both unconstitutional and ineffective at remedying vestiges of past discrimination, the core reason for its theoretical inception. Ironically, although the *Wessman* decision produced a wealth of newspaper editorials, school meetings, and soul searching by those on all sides of the issue, it did not create any real change in the demographics of Boston Latin. It is surprising to note that after the passion aroused by the *Wessman* case, Boston Latin remains, with respect to diversity, just where it was in recent years past. Indeed, one might wonder if the whole debate was much ado about nothing. The old affirmative action scheme at Boston Latin did little more to aid non-Asian minorities and the underprivileged than does the strict merit approach. The racial makeup of the 1999 Boston Latin seventh-grade class, the first to be admitted under the post-*Wessman* race neutral guidelines, looked much the same as the previous year’s class.⁸² Of the 440 seventh graders accepted by Boston Latin, 56 percent were white, an increase of 2 percent over the 1998–1999 school year.⁸³ Roughly 19 percent of those accepted were African-American and Hispanic children, and the number of Asian students remained at 25 percent.⁸⁴

Under both the race-based affirmative action admission plan and the strictly merit plan, the student body at Boston Latin stands in stark contrast to the rest of the student population in the Boston public school system. While roughly 75 percent of the city’s public school children are African-American and Latino, less than one-third of that percentage is accounted for at Boston Latin.⁸⁵ Just as surprising is that in 1996, 70 percent of new Boston Latin students came from either private schools or five of the city’s seventy-five elementary schools.⁸⁶ Moreover, although 62 percent of Boston public middle and high school students systemwide are poor or working class — eligible for free or reduced price lunches — it was predicted that under the strictly merit-based admission policy only 29 percent of the Boston Latin student body would qualify for such lunches.⁸⁷ That number is exactly the same as that under the affirmative action scheme struck down by *Wessman*.⁸⁸

For those who are disappointed with the present system, there is a strong incentive to look elsewhere for solutions. Class-based affirmative action will indirectly compensate for past discrimination while emphasizing a goal promoted by *both*

supporters and detractors of race-based affirmative action: equal opportunity.⁸⁹ The essence of class-based affirmative action is the desire to give aid to those children who have performed well in overcoming obstacles that are linked to poor academic performance.

As Richard Kahlenberg, a law professor who has written extensively in support of class-based affirmative action, claims, “Class preferences help those who need it.”⁹⁰ The poor face obstacles to achievement that go unaddressed by antidiscrimination laws; these obstacles are either mitigated or exacerbated by the issue of race, but they remain present in some form for all who do not have money.⁹¹ Although American ideology trumpets the notion of meritocracy and equal opportunity, the actual opportunity to break free from the class into which one is born is rare.⁹² Sociologist Christopher Jenks has noted:

If we define “equal opportunity” as a situation in which sons born into different families have the same chances of success, our data show that America comes nowhere near achieving it. . . . The sons of the most advantaged fifth could expect to earn 150 percent to 186 percent of the national average, while the sons of the least advantaged fifth could expect to earn 56 percent to 67 percent of the national average.⁹³

Indeed, it is frightening that one could walk into a hospital crèche, knowing nothing more than the class into which each baby happened to be born, and predict what economic success each child will have over the course of his lifetime. Class-based affirmative action works to undermine this reality by stressing equality, to the extent that it attempts to account for many of the externalities that stunt learning in certain environments. However, individual liberty is not lost; class-based affirmative action can be distinguished from measures designed to bring about general equality of socioeconomic status. The policy does not guarantee results, but instead allows natural talent to dictate success, to the extent that one is willing to work hard to obtain it. Primary and secondary schools, rather than colleges, universities, and entry-level jobs, provide the only substantive avenue for an individual born into poverty to advance. Boston Latin, the premier public school in Boston, bears the weight of this reality, and for this reason ought to open its doors to talented children from all walks of life across the city.

Although many support the ideal of equal opportunity, it is both expensive and intrusive to equalize starting places.⁹⁴ Class preferences seek to adjust for the latent potential of those who have faced obstacles and done fairly well nonetheless.⁹⁵ Although a racial preference might unfairly benefit the daughter of an African-American doctor who has enjoyed all the benefits that accrue to the well-to-do over the son of a white welfare recipient, a class preference would focus on the party lacking opportunity, in this case the white boy.⁹⁶ Much of the debate over race-based affirmative action focuses not on being a minority per se, but on what it entails to be a minority. Although minority status does not automatically confer socioeconomic disadvantage on an individual, there is a strong correlation between the two. When viewed in this light, minority status is not synonymous with one’s attributes and how they relate to success, but rather with the external obstacles one must face on the road to success. Both sides of the equality debate might agree that counting obstacles overcome, along with academic qualifications, better approximates true meritocracy than adding points for racial background or looking exclusively at test scores.⁹⁷

Many Americans acknowledge that the poor lack opportunities enjoyed by the rich and that, because of past discrimination, African-Americans are disproportion-

ately poor.⁹⁸ Thus, many who would benefit from race-based affirmative action will also benefit from class-based affirmative action. However, individuals who belong to a historically oppressed group but who have prospered will not. A limiting theory that addresses only economic disadvantage, not continued direct societal discrimination, avoids speculation about one's personality or background simply on the basis of race, offering the public a more palatable option for providing equal opportunity to all; a *New York Times* poll of December 1998 found that while Americans reject racial preferences 52 percent to 35 percent, they support replacing such policies with preferences for the poor by 53 percent to 37 percent.⁹⁹

What Factors Can Implement Class-Based Affirmative Action?

Any definition of class should begin with the family income of an applicant, as income is the most readily attainable measure of the gap between the rich, the middle class, and the poor.¹⁰⁰ Income alone, however, is sometimes a misleading indicator of class restrictions. In *The Remedy: Class, Race, and Affirmative Action*, Richard Kahlenberg details a more copious definition that involves five other factors distinct from family income: parental education, wealth, and occupation, as well as family structure and neighborhood influences on a child.¹⁰¹

These additional indicators expose anomalous situations in which parental income belies actual class impediments. There is a strong correlation between parental education and a child's academic achievement and life chances.¹⁰² As Kahlenberg notes, "A private school teacher with a master's degree may make less than a unionized sanitation worker, but provide her child with greater educational advantages."¹⁰³ Although wealth normally correlates with income, ascertaining a family's net wealth helps to round out the picture, especially where one parent has taken time off from work but still possesses many assets.¹⁰⁴ Furthermore, African-Americans generally have less net wealth than whites of the same income group, "partly due to residential discrimination and less inherited 'family' money, so including net worth in the calculus helps reflect that legacy as well."¹⁰⁵

Taking account of parental occupation adds another check in determining obstacles overcome; a father's occupational status has traditionally been a better predictor of his son's eventual occupation than the father's wealth.¹⁰⁶ Also, family structure is often a good predictor of a child's success.¹⁰⁷ Many children reared in one-parent households have continued on to success, but as Sara McLanahan and Gary Sandefur have noted, "Adolescents who have lived apart from one of their parents during some period of childhood are twice as likely to drop out of high school, twice as likely to have a child before the age of twenty, and one and a half times as likely to be 'idle' — out of school and out of work — in their late teens and early twenties."¹⁰⁸ Finally, neighborhood influences, such as the percentage of households living in poverty, median family income, male unemployment rate, and percentage of female-headed households, are objective measures of externalities that could have a negative influence on a child's life chances.¹⁰⁹

The creation of six class-based categories by which to judge an applicant allows for an objective analysis of obstacles overcome by a candidate. The importance of an objective standard by which to measure class is highlighted when juxtaposed to a subjective standard such as the California state university admission plan that calls

for extra consideration for those who have lived in “an abusive or otherwise dysfunctional home.”¹¹⁰ Unless there has been state action verifying that a child has endured an abusive or otherwise dysfunctional home, using such a subjective factor makes a preference system almost unimplementable. Additionally, critics question whether allowing the applicant to define his home situation as advantaged or disadvantaged will induce applicants to “play the victim.”¹¹¹ Relying on objective, quantifiable factors allows administrators to compare applications effectively, and it relieves an aspirant of the ignominious task of regurgitating all that has gone wrong in his life.

Although such comprehensive class indicators help to define disadvantage, not all impediments to equal opportunity concern class. Physical disability, language difficulties, and direct societal discrimination are additional disadvantages that hinder success.¹¹² Ideally, schools would consider these factors when reviewing admission applications, although at some point, of course, the trade-off between fairness and efficiency tips in favor of the latter.¹¹³ Class remains the most easily implementable, effective gauge of disadvantage.

Is Class-Based Affirmative Action Constitutional?

Of course, it would be a waste of time, energy, and political capital to craft an admission plan to displace the current one if it too violated the Constitution. Class-based affirmative action does not pose a constitutional problem. For the purposes of Equal Protection analysis, the Supreme Court does not treat individuals of lower socioeconomic status as a suspect class.¹¹⁴ Thus, unlike a race-based plan, any effort to create class-based affirmative action will not be subject to strict scrutiny by the Court.¹¹⁵ In the field of education, the Court has refused to strike down the class-based unfairness of inequitable funding. For example, in *San Antonio Independent School District v. Rodriguez*, the Court refused to apply strict scrutiny to a Texas school financing system that relied on local property taxation, therefore disproportionately benefiting children from communities with a high property tax base.¹¹⁶ In fact, even a showing that a school is aware that its choice of factors for class-based affirmative action will have a disproportionate effect on a racial class would not violate the Equal Protection clause.¹¹⁷

Perhaps the first inkling that the Supreme Court would support a class-based program came in 1974, when Justice William Douglas, dissenting in *Defunis v. Odegaard*, argued that the Equal Protection clause could allow consideration of “barriers that [the applicant] had to overcome.”¹¹⁸ Since then, the composition of the Court has changed drastically, but it has become more evident that it would be willing to accept class-based measures. Both Justice Antonin Scalia and Justice Clarence Thomas, two of the most vociferous opponents of race-based affirmative action, endorsed class-based preferences before ascending to the Court.¹¹⁹ In *City of Richmond v. Croson*, the Court struck down a minority business utilization set-aside plan.¹²⁰ Justice Scalia noted in his concurring opinion that states could “adopt a preference for small business, or even for new businesses — which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have a racially disproportionate impact, but they are not based on race.”¹²¹ Writing for the majority, Justice Sandra Day O’Connor, another conservative member of the Court, was even more sympathetic to race-neutral measures set up to address the barriers faced by many small or new business owners.¹²²

Because a class-based policy does not require strict scrutiny under Equal Protection jurisprudence, all that is necessary for a class-based scheme to pass constitutional muster is that it be rationally related to a legitimate state interest, which in the case of Boston Latin could be said to be the provision of an equal opportunity for all talented children to attend the city's premier public high school.

The Implementation of Class-Based Affirmative Action at Boston Latin

In 1996, after the constitutionality of Boston Latin's set-aside program was first questioned, Boston school superintendent Thomas Payzant commissioned Bain & Co. (hereinafter Bain), a consulting firm, to review possible admission schemes that might affect the school's racial and ethnic makeup.¹²³ The policy chosen by the School Committee was the one eventually struck down in the *Wessman* case. In the process of creating options, however, Bain reviewed other policies that took economic factors into account. Bain did not use Richard Kahlenberg's more complex economic and social indicia to create its alternative policies. Instead, it simply used the qualification for free or reduced price lunch as an indicator of disadvantage.¹²⁴ Nonetheless, the various policies succeed in achieving a racial mix similar to that of both the current race-neutral admission policy and the unconstitutional policy of *Wessman*. At the same time, they increase the number of disadvantaged children at Boston Latin and reduce the number of children transferring in from private schools, an issue over which the court in *Wessman* expressed concern.¹²⁵

Table 1

Possible Admission Policies to Boston Latin and Predicted Ramifications

Admission Policy: % of students with highest composite test scores admitted/% admitted through weighted plan	Econ Mix % (%students qualifying for free or reduced price lunch)	Ethnic Mix: (%black and Hispanic)	% seats filled by highest ranking students	Highest ranking student not accepted (percentile)	Lowest ranking accepted (percentile)	% Private School Children Accepted
A. Race neutral- Straight from Top	29%	18%	100%	80th	80th	51%
B. 25% top composite scores/75% to city clusters	31%	21%	87%	88th	64th	50%
C. 50% top composite scores/50% city clusters	31%	20%	92%	80th	79th	48%
D. 7.5% bonus added to composite score of children who qualify for free or reduced-price lunches	53%	22%	76%	87th	62nd	33%

Table 1 Continued

Admission Policy: % of students with highest composite test scores admitted/% admitted through weighted plan	Econ Mix % (%students qualifying for free or reduced price lunch)	Ethnic Mix: (%black and Hispanic)	% seats filled by highest ranking students	Highest ranking student not accepted (percentile)	Lowest ranking accepted (percentile)	% Private School Children Accepted
E. 5% bonus added to composite score of children who qualify for free or reduced-price lunches	46%	20%	83%	85	68th	37%
F. 50% top composite scores/ 50% cluster with 5% bonus to students within the cluster who qualify for free or reduced-price lunches	45%	23%	83%	88th	58th	39%
G. 5% bonus to composite scores of Boston Public School Children	39%	21%	82%	87th	72nd	33%
H. allocate based on % of 6th- graders in BPS	42%	22%	79%	88th	70th	32%
I. 50% top composite scores/50% cluster w/5% bonus for Boston Public school children	40%	24%	82%	89th	58th	33%
Unconstitutional-- Wessman Policy	29%	22%	97%	81st	76th	-----

Source: Bain Report, Submitted to Boston school superintendent Thomas Payzant, 1996.

Methodology for Table 1

Numerous plans, most of which appear in the table, were examined by Bain. Bain's policies weighted certain criteria more or less in determining who would be admitted. Class, as defined by qualification for free or reduced-price lunches was one weighted factor, but Bain also explored policies that offered bonuses to the children who were applying to Boston Latin from a Boston public school or policies that divided the city into ten educational "clusters" and required some measure of proportional geographical representation at Boston Latin. Bain predicted how each plan would affect Boston Latin:

Plan A: Straight from the top: all seats awarded based on predictive formulas only.

Plan B: 75% Allocation Option: 25% seats awarded on predictive formulas only. 75% allocated to the ten city neighborhood clusters based on student population. Within each cluster, seats are awarded based on predictive formula only.

Plan C: 50% Allocation: Same premise as Plan B, but the breakdown between methods is 50/50.

Plan D: 7.5% Economic Bonus: 7.5% bonus added to the predictive formulas of students who are economically qualified (for the purposes of all of the plans concerning economics, this term refers to children who are eligible to receive either free or reduced-price lunches at school). Seats are then awarded based on adjusted formulas.

Plan E: 5% Economic Bonus: Same premise as Plan D, but lower bonus award.

Plan F: 50% Allocation/5% Economic Bonus: 50% seats awarded based on predictive formulas only. 50% allocated to the ten clusters based on student population. Seats are awarded within each cluster based on formulas after 5% bonus is added to economically qualified students' scores.

Plan G: 5% Public School Bonus Option: 5% bonus added to predictive formulas of applicants attending Boston public schools. Seats are then awarded based on the adjusted formulas.

Plan H: Public School Allocation Option: Allocate seats to Boston public school students based on the percentage of Boston sixth-graders in public school.

Plan I: 50% Allocation/5% BPS Bonus: 50% seats awarded based on predictive formulas only. 50% allocated to the ten clusters based on student population. Seats awarded within each cluster based on formulas after a 5% bonus is added to public school students' scores.

Plan N: This option, selected by the School Committee and subsequently ruled unconstitutional, is detailed in the "Background" section of this article.

Admission policy F, for example, would allocate 50 percent of Boston Latin's seats to those with top composite scores (grade point average and standardized test scores), and 50 percent to ten city clusters based on student population. Seats within each cluster would be awarded to the applicants with the highest composite scores, after a 5 percent bonus is added to economically qualified students' scores. This plan ensures a cross section of students from each city neighborhood and benefits those who have excelled in their particular circumstances. Under such a policy, the predicted mix of black and Hispanic students at Boston Latin is 23 percent, a higher percentage than the current number and higher too than that under the unconstitutional affirmative action policy. The percentage of seats filled by the highest-ranking applicants is predicted to be 83 percent, lower than both the current policy and a race-based affirmative action policy but roughly tantamount to all other policies contemplated. At the same time, the percentage of students receiving free or reduced

lunches is predicted to rise dramatically to 45 percent of the student body, almost 50 percent more than the number under either the current or the unconstitutional policy.

Similarly, admission plan E gives a bonus to economically qualified students but does not factor in neighborhood representation. Seats would be awarded to those with the highest composite scores after a 5 percent bonus is added to the economically disadvantaged students' composite scores. It too, much like plan F, boosts the numbers of minority and disadvantaged students disproportionately when compared with the fall in composite scores and creates more space for students who have attended Boston public schools. Furthermore, although Bain used only qualification for free or reduced price lunch as an economic gauge, an infusion of Kahlenberg's more complicated indicators into the process would do nothing to minimize minority representation. On the contrary, it would most likely bolster it, as blacks and Hispanics in Boston suffer disproportionately in Kahlenberg's categories.¹²⁶

**Why Many Criticisms of Class-Based
Affirmative Action Would Not Apply to Boston Latin**

One consistent and meritorious criticism of class-based affirmative action plans by those who support traditional affirmative action is that it provides little aid to disadvantaged minorities. Although a higher percentage of blacks than whites are poor, there are more poor whites in America than there are poor blacks.¹²⁷ Thus, a randomly selected black person is more likely to be poor than a randomly selected white person.¹²⁸ Twenty-one percent of black families have family incomes of less than \$10,000, compared to 6.8 percent of white families, but there are more than twice as many white families in this income category (see Table 2).¹²⁹

Table 2

Family Income (1994 dollars)	National Income Distribution	
	White Families: Total in Thousands: (% of Total)	Black Families: Total in Thousands: (% of Total)
< \$K	1,344 (2.3%)	664 (8.2%)
\$5k-10k	2,630 (4.5%)	1,036 (12.8%)
\$10k-15k	3,624 (6.2%)	906 (11.2%)
\$15k-25k	8,533 (14.6%)	1489 (18.4%)
\$25k-35k	8,474 (14.5%)	1,093 (13.5%)
\$35k-50k	10, 812 (18.5%)	1,198 (14.8%)
> \$50k	23, 027 (39.4%)	17,16 (21.2%)

Source: See U.S. Bureau of the Census, "Statistical Abstract of the United States 1996," table 49, 48. (Cited in Tung Yin, "A Carboic Smoke Ball for the Nineties: Class-Based Affirmative Action," *Loyola of Los Angeles Law Review* 31 [213, 229].)

This disparity in total numbers dooms some class-based admission policies in the eyes of affirmative action opponents as it may lead to an influx of poor and middle-class white and Asian students, creating fewer spaces for disadvantaged blacks and Hispanics. According to the University of Berkeley's own 1997 report, a switch

from race-based preferences to class-based preferences would have led to a reduction of blacks in Berkeley’s incoming class from 6.5 percent to 3 percent.¹³⁰ An unpublished analysis by a Harvard economist concluded that “to replicate the current level of nonwhite admissions, elite colleges would have to grant preferences to six times as many low-income students,” which would “sharply lower average test scores and displace huge numbers of high-scoring middle income whites.”¹³¹

This criticism of class-based affirmative action does not apply to Boston Latin where, by force of numbers, minorities are not precluded from the benefits of class-based affirmative action. Although Massachusetts is predominantly white, the city of Boston, the area Boston Latin serves, is far more racially diverse. Over the past decade, the student body in Boston’s public high schools has been 48 percent black, 25 percent Hispanic, 8 percent Asian, and 17 percent white.¹³²

The most obvious analogy to possible minority admittance to Boston Latin is the United States military. More than 5 percent of black men between the ages of 18 and 21 now apply for military service — nearly twice the rate of white applicants.¹³³ David Armor of George Mason University has estimated that if the military admitted all applicants on the basis of a lottery, about half the force would be black.¹³⁴ Because the military has so many minority applicants from whom to choose, it can eliminate the weakest candidates and still end up with a force that is 33 percent black, a number roughly three times the percentage of blacks in civilian society.¹³⁵

Nevertheless, critics of class-based affirmative action point out that there is an achievement gap on standardized tests between whites and non-Asian minorities that is not simply dependent on class.¹³⁶ A recent report by the American College Board bears out this claim.¹³⁷ Blacks whose parents are upper middle class with college degrees score much lower on standardized tests than whites from the same background.¹³⁸ This pattern holds true for all economic rungs.¹³⁹ As Table 3 illustrates, the disparity between test scores is so large that, on standardized tests, affluent blacks tend to score just below the level of some of the least-well-off whites. Test scores by parental education and race show similar patterns of underperformance by blacks when compared with their white counterparts.¹⁴⁰ Table 4 illustrates this point.

Table 3

1996 Mean SAT Scores by Race and Family Income			
Family Income	White	Black	Difference
< \$10k	977	788	189
\$10k-20k	985	817	168
\$20k-30k	1004	848	156
\$30k-40k	1014	868	146
\$40k-50k	1030	888	142
\$50k-60k	1042	907	135
\$60k-70k	1059	913	146
\$70k-80k	1072	927	145
\$80k-100k	1090	950	140
> \$100k	1129	1007	122

Source: See College Entrance Examination Board & Educational Testing Service, 1996 College Seniors: A Profile of SAT Program Test Takers, table 4-2 (1996). (Cited in Tung Yin, "A Carbolic Smoke Ball for the Nineties: Class-Based Affirmative Action," *Loyola of Los Angeles Law Review* 31 [233].)

Table 4

1996 Mean SAT Scores by Parents' Education and Race

Parents' Education	Whites	Blacks	Difference
No High School Diploma	908	767	141
High School Degree	981	825	156
Some College	1003	853	150
College Degree	1073	900	173
Graduate Degree	1128	950	178

Source: See College Entrance Examination Board & Educational Testing Service, 1996 College Seniors: A Profile of SAT Program Test Takers, table 4-2 (1996). (Cited in Tung Yin, "Carbolic Smoke Ball for the Nineties: Class-Based Affirmative Action," *Loyola of Los Angeles Law Review* [233].)

Thus, simply having a large number of lower-class blacks or blacks born to parents with little education does not guarantee that these children will benefit from a class-based scheme. Even with a boost to his composite score, a poor black child's standardized test score — and as a result his composite score — may still not be high enough to gain admission to Boston Latin. The American College Board report indicates that racism, low teacher expectations, and black and Hispanic students' own fears of appearing "too white" are factors, distinct from class, which have cemented a gap in achievement between non-Asian minorities and their white counterparts.¹⁴¹ Some critics fear that class-based affirmative action will bypass these students. This difficult criticism strikes at the very core of class-based affirmative action — that it targets those who are disadvantaged. Author Tung Yin has written of the disparity in standardized test scores, "It follows that the playing field would not be leveled unless poor blacks received the highest level of preferential treatment."¹⁴²

Despite the inability of a race-neutral, class-based affirmative action admission policy at Boston Latin to reach some of the most underprivileged minority youths in Boston, such a policy, regardless of its permutation, would at the very least maintain or increase minority enrollment at Boston Latin, and increase the number of free or reduced price lunch recipients by up to 50 percent. When analyzing class-based affirmative action in examination-based magnet schools, one must remember that any admission policy is not a panacea for all problems in public education. Primary schools must work in conjunction with families to prepare each child to perform up to his capabilities. Although aimed at combating some of the societal and educational discrimination minority children face, the policy here is also a broader measure to help *any* child unfortunate enough to be born into poverty, a situation over which the child has absolutely no control. Criticism concerning class-based affirmative action's inability to reach as many minority children as may be in need is understandable, but it should not undermine the ultimate goal of the policy: to help disadvantaged children who have overcome economic obstacles and succeeded academically. On this front, the Boston public schools have yet to meet the challenge. During the 1998–1999 school year, 53 percent of seventh-grade invitations to Boston Latin and almost 60 percent of ninth-grade invitations went to students of private and parochial schools.¹⁴³ In addition, certain public schools better prepared their

students for entrance into Boston Latin. During the 1996–1997 school year, 119 of the 513 students admitted to Boston Latin came from five public schools.¹⁴⁴ All five offered advanced work.¹⁴⁵ By contrast, 61 of the city's other elementary schools, which did not offer advanced work classes, had only 57 successful applicants to Boston Latin.¹⁴⁶ Boston Latin is only one part of a school system that must work to provide its students with a basic education. Understandably, Boston Latin's role in this process is highlighted because, as an examination-based school, its emphasis must be on admitting children who are qualified to succeed in the given curriculum. To this end, Boston Latin cannot be held accountable for remedying the educational deficiencies of all the underprivileged children in Boston. It can, however, offer a real opportunity to the most talented underprivileged minority children to go to the most prestigious public high school in Boston.

Class-Based Affirmative Action Would Not Engender Stigmatization

Some critics of race-based affirmative action assert that a stigma attaches to the beneficiaries of the policy, working concurrently to undermine the benefits that accrue to the advantaged group.¹⁴⁷ The Court in *Hopwood* voiced this concern:

The message from government is written very large when [affirmative action] proliferate[s]: a double (and softer) standard for admission, a double (and softer) standard for hiring, a double (and softer) standard for promotion, a double (and softer) standard for competitive bidding, and so on. Without question, this is a systematic racial tagging by government, a communication to others that the race of the individual they deal with bespeaks a race-related probability, created solely by the government itself, of lesser qualification than others holding equivalent positions.¹⁴⁸

One might argue that a child admitted to Boston Latin by way of a 5 percent increase in his composite score (or any other class-based method) would know this and, in turn, question his own abilities, much the same way a black child might internalize negative stereotypes about his race. Furthermore, this internalization of inferiority might be accompanied by a stigma attached to the child, his success being attributed to the preference granted him by others.¹⁴⁹ However, there are three fundamental differences between race-based and class-based affirmative action that provide for why a stigma would not attach to the underprivileged. First, race is easily identifiable, and socioeconomic status is much less so. Because minorities are obviously identifiable, they are easily stigmatized as members of a group in need of preferential treatment. There is no way to gauge whether someone was admitted through preferential treatment based on class unless that individual makes his background known.

Second, race-based affirmative action treats an applicant as a member of a group, not as an individual. It grants preferences on the basis of skin color without regard to whether the individual has been confronted with the obstacles generally presented to those of his "group." Conversely, class-based preferences speak directly to obstacles an individual has faced and what he has accomplished despite the impediments. To be accepted to Boston Latin, each underprivileged child will, at the very least, have excelled in overcoming obstacles. Third, race, unlike class, is an immutable characteristic. Even if class were identifiable at first glance, Americans do not *perceive* class to be static, and it is therefore less given to permanent classification.¹⁵¹

Race-based affirmative action simply highlights skin color differences and continues to divide society along a racial fault line.¹⁵² Class-based preferences decrease the public's consciousness of race and increase its consciousness of class, a characteristic that bonds many who have battled so passionately about the admissions issue. Speaking on the school-busing problem in Boston in the early 1970s, Harvard professor Robert Coles stated,

The ultimate reality is the reality of class ... that's the real struggle that's going on. And to talk about [busing] only in terms of racism is to miss the point. It's working class people who happened to be white and working class people who happened to be black ... poor people ... both of whom are very hard pressed; neither of whom have got much leverage on anything. They are both competing for a very limited piece of the pie, the limits of which are being set by the larger limits of class which allows them damn little, if anything.¹⁵²

In moving away from race consciousness, class-based preferences may bond races along economic lines by decreasing competitiveness between those who are, in actuality, most alike.

Class-Based Affirmative Action Would Not Subvert Meritocracy

Critics of all methods of affirmative action in education suggest that it lowers educational standards. A frequent retort to this accusation is the question By what standard does one judge?¹⁵³ Over the first three hundred sixty-three years of its existence, Boston Latin did not use standardized tests for admissions.¹⁵⁴ Instead, applicants were judged by their grades and recommendations from prior schools.¹⁵⁵ Only in the mid-1970s did a nationally standardized independent school test begin to be used.¹⁵⁶ For better or worse, this is now the relevant standard to which students are held.¹⁵⁷ If anything, the trend toward using standardized tests in admissions is increasing.¹⁵⁸ Under the relatively simple class-based affirmative action plans put forth by Bain (see Table 3), the percentage of seats filled by the highest-ranking students would indeed be below both the one seen in the current policy and the race-based policy struck down in *Wessman*. Under Bain proposals E and F — both granting a 5 percent bonus to the scores of economically qualified students — 83 percent of the Boston Latin student body would be comprised of the highest-ranking students as opposed to 100 percent under a strict merit selection process. Under plan E, the other 17 percent of seats would be filled by students with scores ranging from the 68th to 80th percentile.

Once again, the circumstances surrounding the Boston Latin controversy undermine some of the hostility toward a class-based policy. Richard Kahlenberg sums up best the principles that underlie the establishment of class-based preferences:

The system's primary goal must be to provide genuine equality of opportunity, where natural talents may flourish to their full potential. In order to do this, we should create an obstacles test, which says that if a given individual did quite well, despite various impediments, then he is very talented and/or hard working; he deserves an edge because he has great long run potential. The goal is not to absolve people from responsibility for their own actions. Rather than excusing underachievement, we are saying that if an individual has faced serious obstacles and been relatively successful anyway, he has something special worth developing.¹⁵⁹

Kahlenberg's words carry less and less weight when they are applied to circumstances that extend beyond the formative years. As individuals grow older, disadvantage becomes increasingly enmeshed with personal life choices, and it becomes more and more difficult to apportion blame for an individual's lack of success. Using class to determine who is admitted to college, who is admitted to graduate school, who is offered a job, or who is promoted is debatable; it may be neither wise nor fair, but Boston Latin is concerned with the test scores of children as young as eleven years old. At such an age, it is rare that a child has yet had the *opportunity* to exert his will over his situation. Thus, disadvantage rests heavily on the situation into which he was born. Primary and secondary education is crucial to the development of social and academic skills. If society uses class-based preferences for seventh graders, it may more confidently use a process-oriented, formal equality approach when students reach the age of eighteen. It is precisely when children are young that we should attempt to determine whether they possess what Kahlenberg terms "something special worth developing" or "great long run potential."¹⁶⁰ Granting an underprivileged eleven-year-old a 5 percent increase in his composite score does little to subvert meritocracy if he has exhibited the ability to succeed in every situation into which the Boston public school system has placed him to date.

* * *

Class-based affirmative action offers a constitutional method of bridging the divide between those who support race-based affirmative action and those who do not. Given Boston's size and diversity, class-based preferences can effectively maintain Boston Latin's standards while maintaining or increasing minority representation in the student body and granting talented underprivileged children a chance at succeeding on a higher level. Given our country's constant focus on the issue of race, it is no surprise that schemes of class-based affirmative action have met with seeming cultural and legal hesitation. States are, however, beginning to embrace the many advantages and legal possibilities outlined above. While still governor of Texas, President George W. Bush oversaw a state law that guaranteed admission to a Texas public university to every Texas student who finished in the top 10 percent of his high school class. Thus, each student, regardless of economic class or home situation, is rewarded for succeeding in the school system into which the state of Texas has placed him. Texas's bold experiment is at the forefront of this new emphasis on class disadvantage. It has already been imitated by Florida and California, and three years into the law's existence, the racial mix at public universities has been restored to roughly what it was under the traditional affirmative action scheme that preceded it.

The question now is whether the leaders of Boston are willing to put aside political differences and follow this progressive wave. As the oldest public school in America, and the best public school in Boston, Boston Latin stands as a natural leader in the field of education. What better institution to start Boston down the road to a more effective way of approaching the old problems of race and education? Class-based affirmative action at Boston Latin offers the best opportunity for the school and the city to unite in the common cause of educating the city's brightest young minds.✻

Notes

1. *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998).
2. *Ibid.*
3. Bebe Nixon, "Race to the Top," *Mother Jones*, Online Edition, September–October 1997, 1.
4. *Ibid.*
5. *Ibid.*
6. *Ibid.*
7. *Ibid.*
8. *Boston Latin Tops State's MCAS*, TheBostonChannel.com, December 4, 2000, 1.
9. Nixon, "Race to the Top," 1.
10. See *Morgan v. Hennigan*, 379 F.Supp. 410, 480–481 (D.Mass.1974).
11. See *ibid.* at 467–468.
12. *Ibid.*
13. See *Morgan v. Nucci*, 831 F.2d 313, 319–326 (1st Cir. 1987).
14. See *Wessman v. Gittens*, 160 F.3d at 793.
15. See *McLaughlin v. Boston Sch. Comm.*, 938 F.Supp. 1001, 1018 (D.Mass.1996).
16. See *Wessman v. Gittens*, 160 F.3d at 793.
17. *Ibid.*
18. *Ibid.*
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*
24. *Ibid.*
25. *Ibid.*
26. *Ibid.*
27. *Ibid.*
28. *Ibid.*
29. *Ibid.*
30. *Ibid.*
31. *Ibid.*
32. *Ibid.*
33. *Ibid.* at 794.
34. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996, cert. denied, 116 S.Ct. 2581 (1996)). The court held that "the use of race to achieve a diverse student body . . . simply cannot be a [compelling] state interest."
35. *Wessman v. Gittens*, 160 F.3d at 795.
36. See *Regents of the Univ. of Cal. v. Bakke*, 98 S.Ct. 2733, 2762 (1978) (opinion by Powell, J.). In *Bakke*, the Medical School at the University of California at Davis operated an admission program that reserved 16 out of 100 spots for minority applicants. Additionally, members from minority groups were reviewed under a separate process. Justice Powell, in his controlling concurring opinion, found that the use of race to attain a diverse student body was a compelling governmental interest.
37. *Wessman v. Gittens*, 160 F.3d at 799.
38. *Ibid.* at 803.
39. *Ibid.* at 807.
40. *Ardarand Construction v. Pena*, 115 S. Ct 2097, 2113 (1995). The court held that any racial classification made by a governmental actor must be reviewed under strict scrutiny. The court has not held this to be true for private actors.
41. See generally *City of Richmond v. J. A. Croson*, 488 U.S. 469 (1989) (plurality opinion).
42. *Ibid.*

43. See 515 U.S. 200 (1995).
44. See generally *Hopwood v. Texas*, 78 F.3d 932.
45. *Ibid.* at 934, 948.
46. *Ibid.*
47. See generally *Podberesky v. Kirwan*, 514 U.S. 1128 (1995).
48. *Wessman v. Gittens*, 160 F.3d at 795.
49. *Ibid.* at 795–796.
50. *Ibid.* at 796.
51. *Ibid.* at 798.
52. *Ibid.*
53. *Ibid.*
54. *Ibid.*
55. *Ibid.*
56. See *Adarand Construction v. Pena*, 115 S. Ct at 2113; *Croson*, 488 U.S. at 500.
57. See generally *Shaw v. Hunt*, 519 U.S. 804 (1996); See also *Adarand*, 515 U.S. at 227. Furthermore, the Court has declined to review *Kirwin v. Podberesky*, a Fourth Circuit decision which invalidated a University of Maryland scholarship program on equal protection grounds, and it has refused to review *Hopwood*.
58. See *City of Richmond v. J. A. Croson*, 488 U.S. at 500.
59. 160 F.3d at 803.
60. *Ibid.* at 802.
61. *Ibid.* at 805.
62. *Ibid.*
63. *Ibid.*
64. *Ibid.* at 806.
65. *Ibid.* at 803.
66. *Ibid.* at 807.
67. *Ibid.*
68. *Ibid.* at 808.
69. *Ibid.*
70. *Ibid.*
71. *Ibid.*
72. *Ibid.*
73. See *City of Richmond v. J. A. Croson*, 488 U.S. at 500.
74. See *Hopwood v. Texas*, 78 F.3d 932; *Ayers v. Fordice*, 111 F.3d 183 (5th Cir. Miss.) 1997, cert denied, 522 U.S. 1084 (1998).
75. See *Cal. Const. Art I. ss. 31(a)* (1997).
76. For example, in a 1995 *Washington Post*/ABC News poll, 75 percent of those surveyed opposed racial preferences, but of those opposed, two in three wanted to “change” the programs rather than “do away with them entirely,” Richard D. Kahlenberg, *The Remedy: Class, Race, and Affirmative Action* (New York: Basic Books, 1996), Introduction, x.
77. See “Recommendations for Modifications in Student Assignment and Student Selection Policies,” memorandum from Thomas W. Payzant to chairperson and members of the Boston School Committee, October 20, 1999.
78. *Ibid.*, 5.
79. *Ibid.*
80. *Ibid.*
81. *Ibid.*, 6.
82. Beth Daley, “Troubling Admissions Statistics at Latin Chances for Blacks Attending Remain Poor,” *Boston Globe*, March 23, 1999, B1.
83. *Ibid.*
84. *Ibid.*
85. See *Wessman v. Gittens*, 160 F.3d at 797.
86. Derrick Jackson, “Who Gets into Latin?” *Boston Globe*, December 23, 1998, A23.
87. See generally Bain Report
88. *Ibid.*

89. Richard D. Kahlenberg, "Class-Based Affirmative Action," *California Law Review* 84 (1996): 1037, 1060.
90. *Ibid.*, 1061.
91. *Ibid.*
92. *Ibid.*
93. *Ibid.*
94. *Ibid.*
95. *Ibid.*
96. *Ibid.*
97. *Ibid.*
98. *Ibid.*
99. Richard D. Kahlenberg, "Class-Based Affirmative Action," *Boston Globe*, January 19, 1999, A11.
100. Kahlenberg, *The Remedy*, 128–139.
101. *Ibid.*
102. *Ibid.*, 129.
103. *Ibid.*
104. *Ibid.*, 132.
105. *Ibid.*; "Net worth differences racial groups are much larger than income differences. While median black household wealth hovers around 60% of white income, medium black household wealth is only 9% of the white median. Researchers have found that black households with incomes between \$45,000 and \$60,000 have a lower mean net worth than white households with incomes between \$7,500 and \$15,000. Several factors that might account for this disparity: the impact of past housing discrimination; the recent arrival of many black families to the middle class and the resulting lack of inherited capital; and the greater persistence of poverty among black families than among white families. Richard D. Kahlenberg, "Equal Opportunity Critics," *The New Republic*, July 17, 1995, 20.
106. Kahlenberg, "Equal Opportunity Critics," 20.
107. *Ibid.*
108. *Ibid.*
109. *Ibid.*
110. Peter Schrag, "When Preferences Disappear," *The American Prospect*, January–February 1997, 38–41.
111. Michael Kaus, "Class Is In," *The New Republic*, March 27, 1995, 6.
112. Kahlenberg, *The Remedy*, 177.
113. *Ibid.*
114. See, for example, *Harris v. McRae*, 448 U.S. 297, 321–322 (9180) (finding, in the context of denial of federal funding of abortions for indigent women, that poverty is not a suspect classification); *James v. Valtierra*, 402 U.S. 137 (1971) (holding that the California requirement of mandatory referendums for construction of low-cost public housing projects did not violate the Equal Protection Clause.) (Cited in Kahlenberg, *California Law Review* 84, 1099, n.146.)
115. *Ibid.*
116. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 105 (1973). (Class action was brought on behalf of schoolchildren who were said to be members of poor families residing in school districts having low property tax base, challenging reliance by Texas school-financing system on local property taxation. The three-judge District Court, 337 F.Supp. 280, rendered judgment holding such system unconstitutional under equal protection clause of the Fourteenth Amendment, and state appealed.) The Supreme Court, 411 U.S. 1 (1973) held that subject action was inappropriate case in which to invoke strict judicial scrutiny test and that such system, which assured basic education for every child in the state and permitted and encouraged participation in and significant control of each district's schools at local level, bore a rational relationship to legitimate state purpose and did not violate equal protection clause of the Fourteenth Amendment.

117. Ibid.
118. See *DeFunis v. Odegaard*, 416 U.S. 312, 337 (1974) (Douglass, J., dissenting).
119. See Antonin Scalia, "The Disease as Cure: In Order to Get Beyond Racism, We Must First Take Account of Race," *Washington University Law Quarterly* 147 (1979): 156 ("I strongly favor . . . what might be called . . . 'affirmative action programs' of many types of help for the poor and disadvantaged."); Clarence Thomas, "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!" *Yale Law & Policy Review* 5 (1987): 402, 410–411 ("Any preferences given should be directly related to the obstacles that have been unfairly placed in those individuals' paths, rather than on the basis of race or gender"). Cited in Tung Yin, "A Carbolic Smoke Ball for the Nineties: Class-Based Affirmative Action," *Loyola of Los Angeles Law Review* 31 (1997): 213, 260, n. 8.
120. See 488 U.S. at 500.
121. Ibid. at 526 (Scalia, J., concurring).
122. Ibid. at 505.
123. *Wessman v. Gittens*, 160 F.3d at 792.
124. Ibid.
125. Ibid. at 808.
126. Boston Planning and Redevelopment Board, "Facts about Boston's Neighborhoods: A Comprehensive Guide to Population, Income, Housing, and Jobs Statistics from the Census (1995), 3.
127. See U.S. Bureau of the Census, *Statistical Abstract of the United States 1996*, 48, table 49. Cited in Yin, "A Carbolic Smoke Ball for the Nineties," 229.
128. Yin, "A Carbolic Smoke Ball for the Nineties," 229.
129. Ibid.
130. Ibid.
131. Ibid.
132. *Wessman v. Gittens*, 160 F.3d at 799, n. 4.
133. Jeffrey Rosen, "Affirmative Action: A Solution," *The New Republic*, August 1995, 1; available in 1995 WL 12434386.
134. Ibid.
135. Ibid.
136. Kate Zernike, "Schools Urged to Close Race Gap," *Boston Globe*, October 17, 1999, A1.
137. Ibid.
138. See College Entrance Examination Board & Educational Testing Service, 1996 *College Seniors: A Profile of SAT Program Test Takers*, at table 4-2 1996) Cited in Yin, "Carbolic Smoke Ball for the Nineties," 233.
139. Ibid.
140. Ibid.
141. Zernike, "Schools Urged to Close Race Gap," A1.
142. Yin, "A Carbolic Smoke Ball for the Nineties," 248.
143. See Preston Green, *May Examination Schools Use Racial Preferences in Their Admissions Process?: Wesson v. Gittens*, *Education Law Reporter* 135 (873).
144. Ibid.
145. Ibid.
146. Ibid.
147. *Hopwood v. Texas*, 78 F.3d at 946.
148. Ibid.
149. Ibid.
150. Kahlenberg, *The Remedy*, 188.
151. Ibid.
152. Ibid.
153. Jackson, "Who Gets into Latin?" A23.
154. Ibid.
155. Ibid.
156. Ibid.
157. Ibid.

158. Ibid.
159. Kahlenberg, "Class-Based Affirmative Action," 1065.
160. Ibid.

